The Japanese Experience on Compensation of Nuclear Damage Caused by Fukushima Accident

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Introduction.

As you know very well, on March 11, 2011 a strong earthquake attacked the north eastern part of Japan. And a huge tsunami followed the earthquake. At Fukushima Daiich Nuclear Power Plant of Tokyo Electric Power Company (TEPCO), these events led to the loss of electrical power and the shutdown of cooling systems of reactors which induced a partial melting of core of three reactors and large radioactive releases. This accident resulted in serious damage to large areas, and the compensation of the damage became an important social issue.

Today in this report I would like to present you the Japanese legal system of the compensation of nuclear damage. In particular, I want to focus on the specific measures that are taken for the smooth and rapid compensation after the Fukushima accident. It is probable that almost all of you have no experience of transaction of a large number of disputes on compensation in a short time. Therefore our experience must be certainly useful for the improvement of your legal regime of compensation of nuclear damage.

The Fukushima accident has caused considerable damages in the very wide geographic area. In early April 2011, the Japanese government established the Dispute Reconciliation Committee for Compensation of Nuclear Damage (DRC) in accordance with the Act on Compensation for Nuclear Damage 1961 (the Compensation Act). Since then the Committee has published several guidelines on the extent of damages which should be compensated.

・" Interim guidelines" (August 5, 2011). This guideline includes two previous guidelines and shows an overall picture of the nuclear damage categories which were recognized and which could be broken down into patterns at that point.

・1st Supplement to the "Interim Guidelines" (December 6, 2011). This Supplement encompasses the damage concerning voluntary evacuation in the scope of nuclear damage which should be compensated. The residents including those who continue to stay in designated area in the guideline are also eligible for compensation.

・2nd Supplement to the "Interim Guidelines" (March 16, 2012).

Based on the change of evacuation areas, this Supplement reviews the scope of damage concerning specified matters (the ordered evacuation, the voluntary evacuation, the decontamination).

・3rd Supplement to the "Interim Guidelines" (January 31, 2013). Based on the survey of the market of the agricultural, forestry and fishery products after the "Interim Guidelines", the scope of rumor-damage is broadened in areas and in categories of items by this Supplement.

・4th Supplement to the "Interim Guidelines" (December 26, 2014). As regards evacuation areas, the scope of nuclear damage associated with the evacuation orders is reviewed by this supplement in addition to the "Interim Guidelines" and 2nd Supplement to the "Interim Guidelines".

These guidelines give the general scope of damage which should be compensated by TEPCO. So since 2015 new guideline is not issued.

The TEPCO, responsible for the accident, makes also his efforts to compensate victims. But I have to say that the compensation does not work so smoothly and rapidly as to satisfy victims, in particular at first stage. We can give some reasons for this slowness of compensation. At least it is clear that the aforementioned law is considered insufficient to solve an enormous amount of compensations demanded by victims within a short period.

Accordingly in this report, we present, at first, the legal system of compensation for nuclear damage under the Compensation Act, and then some measures taken after the accident.

1. General survey of nuclear liability -- Liability at common law (Civil Code) and the special rules for compensation for nuclear damage.

(1) The Civil Code.

Until 2015 Japan was not a member of any international convention on nuclear liability. So the Japan made a law of compensation as seemed to be the best in maintaining of the international level of financial security of nuclear liability.

Concerning the tortious liability, the article 709 of the Civil Code stipulates clearly the principle of liability based on fault. That is to say, one who inflicts damage to other person with his fault must compensate the damage. If he does not commit a fault, he is not liable for damage which he caused.

(2) The Act on Compensation for Nuclear Damage (the Nuclear Compensation Act).

On the other hand, in 1961 the Act on Compensation for Nuclear Damage (the Nuclear Damage Compensation Act) and the Act on Indemnity Agreements for Compensation on Nuclear Damage (the Indemnity Agreements Act) were enacted. The nuclear liability system in Japan is based on these two

acts. According to this system the nuclear operator is responsible for nuclear damage which he caused even if he did not commit a fault. Since then, the basic structure of these acts remains unchanged. Nevertheless, every about ten years, the Nuclear Compensation Act was revised mainly to raise the amount of financial security for compensation. In 2009 this amount was raised to 120 billion yen. It should be noted that the 2009 reform has also added the task of establishing a directive on the extent of nuclear damage which should be compensated by the nuclear operator who inflicts damages, taking into account the process of compensation made during the JCO accident that happened in 1999.

On January 2015 Japan signed the Convention on Supplementary Compensation for Nuclear Damage (CSC Convention). For this signing, Japan made some amendments to Act on Compensation for Nuclear Damage. But these amendments are not so important, because Japanese Act is already in conformity with international principles concerning nuclear liability.

It has to be noted that this Act applies not only to the operation of nuclear reactor, but also to the transport of nuclear material (including nuclear fuel, nuclear waste etc.).

(3) The Civil Code and the Nuclear Compensation Act.

The relation of the Civil Code and the Nuclear Compensation Act seems to be that of the general law and special law. In this case, the special law is applicable prior to the general law. And if there is no suitable provision in the special law, the general law covers the gap. But in the field of tort, the special law generally provides a strict liability which is more advantageous to the victim. So without taking the easy route of the special law, the victim can demand the compensation of suffered damage on proving the hard conditions required by the Civil Code. Accordingly, regarding the legal basis for liability of the nuclear operator, at first view not only the law on compensation for nuclear damage but also the Civil Code applies to nuclear damage. Of course, the Civil Code provides general rules on tort and the Compensation Act covers only the nuclear liability. The Nuclear Compensation Act does not expressly excluding the application of the Civil Code. But the system of Special Compensation Act implicitly means that the provisions of the Civil Code do not apply at least on the basis of the liability of the nuclear operator.

We can show two foundations of reasoning. Firstly the responsibility of persons other than the nuclear operator is excluded by the Nuclear Compensation Act (Art. 4, paragraph 1). Secondly this special law limits the recourse of the nuclear operator against the third person who is responsible for the nuclear accident, after he has compensated to accident victims.

But if there are no rules in the Nuclear Compensation Act, the Civil Code applies. For example, the extent of damages which should be compensated is determined by the Civil Code. This is the *theory of the adequate causality* established by the doctrine and the case law that applies to nuclear damage caused by a nuclear accident. And the amount of compensation may be reduced by taking into account the victim's fault (art. 722 of the Civil Code). But this reduction is no more than theory and in the practice of compensation after Fukushima accident there seems to be no case where the reduction is done according to the article 722.

In any way at least we can say that no third person other than the nuclear operator is responsible for the nuclear accident, because the article 4 of the Nuclear Compensation Act applies and the article 709 of the Civil Code is excluded. Nevertheless, in some cases the victims demand the compensation of nuclear damage by proving the fault of TEPCO according to the article 709 of the Civil Code. The lawyers of the victims want to condemn strongly the fault of the TEPCO. But the judgment of tribunal is not yet done.

2. The Compensation of Nuclear Damage under the Nuclear Compensation Act.

(1) The liability of the nuclear operator without fault and cause of exemption.

The nuclear operator is liable for any nuclear damage even if he commits no fault (art. 3 of the Compensation Act[1]). But in case of "a grave natural disaster of an exceptional character and social revolt" the responsibility of the nuclear operator is exempt. Regarding Fukushima accident, we knew the controversy on the possibility of this exemption. This exemption provision does not specify the definite conditions of the major natural disasters of an exceptional character. But at least in common law of liability, in principle, the fault of the author of the damage (perpetrator) is one of the necessary conditions for the compensation of damage. So even if the natural disaster is so grave that the nuclear operator could not foresee it, it is not considered that the nuclear operator is exempted from the liability. After Fukushima accident, the Japanese government took several measures to protect victims based on the non-application of this exemption.

At all events, it is only the government's interpretation of the exemption provision. It is quite possible that the judicial court decide freely on this point. Recently, a stockholder of TEPCO filed a suit demanding damage compensation

1 Where nuclear damage is caused as a result of reactor operation etc. during such operation, the nuclear operator who is engaged in the reactor operation etc. on this occasion shall be liable for the damage, except in the case where the damage is caused by a grave natural disaster of an exceptional character or by an insurrection.

against the government who took some measures for victims on the assumption that the exemption clause should not be applied. According to the claim of plaintiff, the stock price of TEPCO fell down by the non-application of exemption. Tokyo district court dismissed this claim deciding that the government did not commit negligence by denying the exemption clause[2]. This is not the case on dispute between TEPCO and victim of Fukushima accident. So I don't think this judgment is not an appropriate court decision on this matter.

(2) The unlimited liability.

The liability of the nuclear operator is unlimited. Only the financial security is limited to 120 billion yen.

(3) The legal channeling.

The nuclear liability is concentrated in the nuclear operator. That is to say, in case of a nuclear accident, only the nuclear operator is required to compensate the nuclear damage. Other people are not liable for the nuclear damage. Only when the nuclear operator has compensated the damage, he is able to have recourse against the person who caused the damage intentionally.

(4) The concept of nuclear damage.

The article 2 of the nuclear Compensation Act defines the nuclear damage in its paragraph 2: "nuclear damage" means any damage caused by the effects of the fission process of nuclear fuel, or of the radiation from nuclear fuel etc., or of the toxic nature of such materials (which means effects that give rise to toxicity or its secondary effects on the human body by ingesting or inhaling such materials); however, any damage suffered by the nuclear operator who is liable for such damage pursuant to the following Section, is excluded.

By reading this legal text it is very difficult, if not impossible, to determine effectively the nuclear damage to which this Act applies. In fact in the discussion of DRC, this definition is not in question and we discuss simply if there is a relationship of cause and effect, namely a causal relation between the nuclear accident and the damage in question. In my personal opinion, in the future, we must clarify the distinction between the nuclear damage that the nuclear operator is liable to compensate and that he is not liable to compensate.

(5) Resolution of disputes of compensation for nuclear damage.

With regard to the claim for compensation for the nuclear damage, there

2 Tokyo District Court, 19 July 2012, Hanreijiho, no 2172, p. 57.

are three different ways.

1. Direct negotiation between the victim and the nuclear operator.

2. Mediation by the Center for Dispute Resolution at the Dispute Resolution Committee.

3. The court.

There is no priority among these three means. The victim can choose any of these means which is the most favorable to him. Until now more than 300cases are brought before the judicial court.

(6) The financial security of compensation.

The nuclear operator is required to have a financial security in the amount specified for each category of site or transport by the Nuclear Compensation Act or by an order issued for each application.

In case of Fukushima Daiichi, this is a site composed of six reactors.
As to the means of the financial security of compensation, the nuclear operator, one the one hand, concludes a contract of insurance with a group of insurance companies (insurance pool), on the other hand, enters into an indemnity agreement for the compensation of the nuclear damage with the State. The agreement with the State completes the insurance contract. So when the group of insurance companies is exempt by the terms of the insurance contract, it is the State which finances the nuclear operator in accordance with the agreement. In the case of the Fukushima accident, the group of insurance companies did not pay the amount of coverage, because the earthquake and tsunami are grounds for exemption. In place of the insurer, the State has paid 120 billion yen according to the indemnity agreement.

The Nuclear Compensation Act allows the deposit of money as a means of guarantee. But before the Fukushima accident, the nuclear operator has not passed this way. After the Fukushima accident, the group of insurance companies refused to renew insurance on the Fukushima Daiichi site where four of six reactors were injured. So the company TEPCO has obliged to deposit 120 billion yen of money.

Until now, the damaged reactor is not considered in the above-mentioned system of financial security. So we need to create a new way of financial security for the damaged reactor until the abolition of the reactor. For example, it is possible that the initial financial security covers any damage even if they are caused after the accident. It is also conceivable that the State would be obliged to renew the guarantee agreement even after the accident.

In Japan the amount of financial security is reduced for the nuclear activities which risk is not as high as a large nuclear power plant. Therefore in some types of nuclear material, the amount of financial security is 24 billion

yen（highly contaminated waste, spent nuclear fuel etc.）or 4 billion yen.

(7) Compulsory measures of government.

When the amount of the liability of the nuclear operator exceeds the value of the financial security（120 billion yen）, the government must allocate to the operator such aid as is required for him to compensate the nuclear damage.

The legal character of this provision is somewhat ambiguous, but the government says several times in Parliament that the government gives always the necessary assistance to facilitate compensation by the nuclear operator.

After the Fukushima accident, the government has established a special organization to facilitate the compensation of TEPCO. This is an example of the assistance under the Nuclear Compensation Act.

The article 17 of this Act provides the measures which must be taken in case of the irresponsibility of the nuclear operator under the article 3. This measure taken by the government is, in nature, not the compensation of damages. Therefore it is quite conceivable that the remedy is limited and sometimes the amount of remedy paid by the government is less than the damage suffered actually by the victim of the accident.

(8) The Dispute Reconciliation Committee for Compensation of nuclear damage (DRC).

The Dispute Reconciliation Committee for Compensation of nuclear damage（DRC）is established according to the Nuclear Compensation Act.

(i) The tasks of the DRC.

The DRC takes three tasks.

Firstly, the DRC assume the task to mediate and to reconcile the victim of a nuclear accident and the nuclear operator, if between them there is any conflict on the compensation of damages.

Second, the DRC is to work to establish guidelines to determine the extent of damages which should be compensated. This is a new task given by the reform of 2009 made after the JCO accident.

Third and finally, the DRC takes to task the investigation on the nuclear damage and the assessment for carrying out two tasks as mentioned above.

(ii) The organization of the DRC.

The DRC consists of 10 qualified members of different specialties. This composition is very important for the best function of the committee. After the Fukushima accident, the Minister of Education and Science has established the

committee and nominated its members. I was appointed as a member, specialist of compensation law. After finishing the principal guidelines, on March 2016 some members are replaced and I was retired.

Since its establishment in April 2011, the DRC made distinguished efforts and issued the guideline in several times.

3. The measures taken after the Fukushima accident which make easy the compensation of nuclear damage.

(1) The activities of the DRC.

(i) The guidelines on the extent of nuclear damage.

Since the establishment of the Dispute Reconciliation Committee for Nuclear Damage (DRC), the DRC discussed on the extent of damage which should be compensated, and made a series of guidelines on this matter as I have already mentioned above. The first guideline was published on April 28, 2011, the second guideline on May 31, 2011 and the supplement to the second guideline on June 20, 2011. All these guidelines are incorporated into "Interim guidelines" dated August 5, 2011. And regarding to this Interim guidelines four supplements were issued on December 6, 2011, on March 16, 2012, on January 31, 2013 and on December 26, 2013. We do not enter into the details of these guidelines. Because the contents of these guidelines are so complicated that I cannot explain them in a short time. Therefore we are forced to show you the basic conception of them. The guidelines give the fundamental rules on compensation subject to typical damages which many victims suffered. And we expect that the victims and the company TEPCO may conclude the contract of compromise by reference to principles laid down by these guidelines. Of course they can bring about a settlement which is contradictory to the rules of guidelines

(ii) The legal nature of guidelines.

It is difficult to clarify the legal nature of the guideline. In my personal opinion, the guideline is simply a recommendation to the victims and the nuclear operator. The parties are not legally obliged by the principles laid down by these guidelines. It is also approved that the individual conditions can be taken into account to decide the amount of compensation. In fact there are already some compromises more favorable to the victim than the guideline. But the guidelines are actually respected not only by the company TEPCO but also by the victims as the neutral and independent conception is shown in these guidelines. Even in cases brought before the court, we think that the guidelines actually influence the judge. We can say, at least, that the victim can invoke the guidelines to justify his demand.

For the nuclear operator, liable to compensate nuclear damages, the guidelines are also useful in order to deal many victims fairly and with strict impartiality.

(2) Nuclear Compensation Facilitation Corporation (The Corporation).

After the Fukushima accident, the government has established a special organization to facilitate the compensation of TEPCO. This is an example of the assistance under the Nuclear Compensation Act.

According to the Nuclear Damage Compensation Facilitation Act enacted on August 10, 2011, the Government has established the Nuclear Damage Compensation Facilitation Corporation (Corporation) to get ready for huge compensation payment exceeding the financial security amount in the future, not only for the purpose of supporting the compensation of Fukushima accident, but also as a permanent organization.

This Corporation sets the amount of resources necessary for all nuclear operators. So not only the company TEPCO but also other electric companies are obliged to pay the amount assigned by the Corporation. In this way, the Corporation gives funds to a nuclear operator who needs financial resources for the compensation of nuclear damage.

In August 2014 the function of the promotion of decommissioning is added to the Corporation.

(3) Nuclear Damage Compensation Dispute Resolution Center (ADR Center).

As I explained earlier, it is important initial task of the Dispute Reconciliation Committee (DRC) to resolve the dispute between the victim and the nuclear operator through mediation. But the DRC is composed of only 10 members. Therefore it cannot handle all disputes that have come before the committee. In case of the accident of JCO in 1999, there were only two cases that were brought before the committee. All other cases (approximately 6,000 cases) were resolved amicably by the direct negotiation between the victim and the JCO. However, regarding the Fukushima accident, it was expected that a huge number of claims would be brought before the DRC. Therefore the Nuclear Damage Compensation Resolution Center (ADR Center) was established under the DRC in September 2011.

The ADR Center is composed of 278 councilors, 189 special investigators and 153 staffs[3]. The councilors and investigators are all lawyers. The councilor works part-time as mediator and the investigator works full-time as researcher of all information necessary for compensation. So the function of special

3 This data is at the end of 2015.

investigator is a key point for the resolution of a great number of disputes in a short time.

And the ADR Center opens one office in Tokyo and 5 offices in Fukushima. The ADR Center began its activities in September 2011. Since then 18,610 applications are brought to the ADR Center and 15,864 cases were resolved (85.2%)[4]. At first the number of resolved cases was far less than those newly brought. Afterwards every month about 300 to 500 applications were brought. And about 300 to 600 cases were resolved per month. Therefore, the accumulated cases were decreasing gradually. But recently, in spite of diminution of new cases, resolved cases are also decreased. We can point out the increase of difficult cases which take a lot of time for resolving.

(4) The Compensation paid by TEPCO[5].

According to the home page of TEPCO, TEPCO received 956,000 cases from Individuals, 1,308,000cases from Individuals (Losses due to voluntary evacuation) and 427,000 cases from Corporations and Sole proprietors. Total amounts paid are 6,478.6 billion yen.

(5) Two special acts on statute of limitation for nuclear damage.

As to the limitation of the action on compensation of nuclear damage, there is no article in the Nuclear Compensation Act. Therefore the article 724 of the Civil Code applies to this matter. "The right to demand compensation for damage in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within 3 years from the time when he/she comes to know of the damages and the identity of the perpetrator. The same shall apply when 20 years have elapsed from the time of the tortious act."

In the case of Fukushima accident the right to demand compensation will be extinguished on March 2014. It is feared that many victims will lose the right to demand compensation on March 2014. The TEPCO declared that he has no intention to refuse the compensation by invoking the rules of the Civil Code. But this statement could not relieve the anxiety of victims.

At first the Act on the interruption of Statute of Limitations for Settlement Mediation Procedure in the DRC was enacted on May 29, 2013. According to this act, the application to the ADR Center is considered to be submission of a lawsuit to the court. The period of prescription stops at the time of application and if the mediation is not reached, the victim can bring a case to

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4This data is at the end of 2015.

5 Website of TEPCO on October 2016.

the court within one month even if 3 years after the accident

And the act on Sure and Prompt Compensation and the Special Exception on the Statute of Limitations for the Damage Caused by Nuclear Accident in 211 was enacted on November 29, 2013. This act extends simply the period of prescription to ten years after recognizing the damage and the perpetrator.

Conclusion.

The Nuclear Damage Compensation Facilitation Act 2011 requires the revision of the Nuclear Compensation Act. In occasion of entering into the Convention on Supplementary Compensation for Nuclear Damage the Nuclear Compensation Act was slightly revised. And the discussion of the reform of the Act started on May 2015. Until now the points in question are arranged. We hope that the direction of reform will be clarified in near future.

Regarding the nuclear damage in large scale the Fukushima accident is the first experience not only for the Japanese people but also for the people in the world. Our experience and your observation would find some good ideas to revise the national legal system and international nuclear liability. We would be very pleased if this report will be useful for this revision in the future.